HARVARD

LAW REVIEW.

VOL. XVIII. JUNE, 1905. NO. 8

McCULLOCH *v.* MARYLAND IN AUSTRALIA.

AMERICAN lawyers and publicists will be interested to learn that the doctrine of McCulloch *v.* Maryland has been accepted and applied in Australia. The Australian federal Constitution[1] must be taken to forbid the collection of a state income-tax from federal servants in respect of their official incomes. There is nothing express in the Constitution on the subject; but the recently constituted High Court of Australia has discovered the implied prohibition in the Victorian income-tax cases.[2] *Jus est — id quod judices dicunt.*

The decision has attracted much attention throughout Australia. The man in the street is startled and puzzled. He sees a public official, enjoying a regular salary in the postal department, paying the Victorian income-tax until federation, and then suddenly exempted from the tax because the post-office has passed over to federal control. The official receives just the same benefits from the state activities as he received before; — and state activities are many in Australia. He has the same protection from the police, the same educational privileges for his family, the same conveniences from railways and other public works. His neighbor of the Lands Department and his neighbor the grocer get no more benefit from the state's expenditure than he; and yet they continue to pay the income-tax, and he ceases to pay it. Why?

It must be admitted that the surprise, and even indignation, manifested in many quarters are excusable. The public have not

[1] 63 & 64 Vict. c. 12.

[2] 1 Com. L. Rep. 585.

yet become familiar with the federal system, with the peculiar problems which are presented when two governmental machines, each supreme within its own sphere of operations, are in full play over the same territory and the same people. But is it too much to expect that the writers in newspapers, and others who aspire to guide public opinion, should read and weigh the closely reasoned judgment of the High Court before criticising it, and should know something of the great and continuous stream of masterly decisions of the United States Supreme Court which the judges of the High Court have followed? Probably there has not been in the history of jurisprudence any development more curious or instructive than that of the written Constitution of the United States — the gradual unfolding of the potential implications of its short, pithy sentences — the transition from deduction to deduction, from inference to inference — the laborious and cautious adaptation of a rigid, almost unalterable instrument of government to the live needs of a rapidly growing people and an increasingly complex civilization. If the High Court has erred, it has erred under the fascination of jurists and statesmen of the type of Marshall; and it has merely placed the public officials of Australia in the same position, as to exemption from income-tax, as the public officials of the United States, and even of Canada.

The judgment itself is, in the main, merely a reaffirmance and application of the principles previously laid down by the High Court in d'Emden *v.* Pedder.[1] In that case the deputy postmaster-general of Tasmania was prosecuted for giving an unstamped receipt for his month's salary to the federal paying officer. A Tasmanian act makes "every receipt" for £5 to £50 liable to 2*d.* stamp duty; and any person giving a receipt unstamped is liable to a penalty. On the other hand, the federal Audit Act (No. 4 of 1901) requires every public accountant at the time of paying any account to obtain a receipt. It might, perhaps, have been sufficient to say that the federal parliament had "exclusive" power to make laws with regard to the postal department, under sec. 52 of the Constitution; and that the requirement of the state law was a direct interference with the officers of a federal department in the execution of their duty. Such was the aspect in which the Supreme Court of Victoria regarded d'Emden *v.* Pedder, when it was cited in the income-tax case.[2] But in d'Emden *v.* Pedder the

[1] 1 Com. L. Rep. 91.

[2] 29 Vict. L. Rep. 748.

judges of the High Court based their decision on much broader principles, taking a comprehensive survey of the relations of federal agents and agencies to state legislation. They had laid down the following proposition as the true test to be applied in determining the validity of state laws and their applicability to federal transactions:

"When a state attempts to give to its legislative or executive authority an operation which, if valid, would fetter, control, or interfere with, the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution, is to that extent invalid and inoperative."

It may be observed, in passing, that this proposition, as expressed, would seem to prevent a state policeman from arresting for a crime a federal officer on his way to his work. But whether it covers too wide a ground or not, the judges of the High Court evidently intend to treat it as the guiding principle, the major premise in all judicial syllogisms, on the subject of federal agencies. Where have they found this principle? They have found it in the nature of the Constitution. The express grant of power and control to the Commonwealth would, they say, be ineffective unless the Commonwealth is entitled, within the ambit of its authority, to exercise its legislative and executive powers in absolute freedom, and without any interference or control whatever except that prescribed by the Constitution itself.[1] *Quando lex aliquid concedit, concedere videtur et illud sine quo res ipsa valere non potest;* and therefore the grant of constitutional powers to the Commonwealth involves the grant of absolute freedom from control.

In arriving at this principle the High Court was guided by the weighty judgment of Marshall, C. J., in McCulloch *v.* Maryland,[2] pronounced in 1819, and followed in innumerable cases in the United States. On this decision the whole fabric of the doctrine as to federal agencies has been reared in the United States and in Canada, and now in Australia. The case is so familiar in the United States that it may seem unnecessary in an American review to restate the facts and the outlines of the decision. But it seems to be more satisfactory to do so when a foreigner is endeavoring to show the impression which it has made on his mind. If he is wrong, his error can be the more readily detected. In 1816

[1] See 1 Com. L. Rep. 109–111.

[2] 4 Wheat. (U. S.) 316.

Congress passed an act purporting to incorporate the Bank of the United States; in 1817 a branch was established at Baltimore, Maryland; and in 1818 the state legislature of Maryland passed a law taxing all banks or branches thereof *not chartered by the state legislature*. The cashier of the branch, one McCulloch, was sued for the amount of the tax, and, the state court having given judgment for the plaintiff, an appeal was brought to the Supreme Court of the United States. The first question was, had Congress power to incorporate a bank? Now the Constitution conferred on Congress power to legislate on certain enumerated subjects; and unless the power were given expressly or by necessary implication, Congress could not have it — its legislation would be void. The states retained all the residuary powers: "The powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively or to the people." [1] The Constitution does not prohibit the states from creating corporations for purposes of gain or otherwise. Indeed, each of the states has its own company law. But in conferring on Congress the specific powers of legislation, the following general power was added: "To make all laws which shall be *necessary and proper* for carrying into effect the foregoing powers, and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof." This general power is not treated by the jurists as enlarging the powers specifically given, or as granting any new power to Congress. It merely removes all uncertainty that the means for carrying into execution the express powers are included in the grant.[2] Marshall also relied on the fundamental fact that *within its sphere of action* the federal power is supreme: "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." [3]

The Constitution then, being one of enumerated, not residuary powers, and there being no express power to create corporations — whether for private gain or for any other purpose — where did Marshall find the power in Congress to create this bank? The bank was owned by a company of persons, shareholders, carrying

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[1] Art. X.

[2] Cooley, Const. L. 105; Hare, Const. L. 117.

[3] Art. VI.

on the business of banking for their private profit. The United States took one-fifth of the capital, $55,000,000. The federal government was to deposit its funds with the bank, the bank receiving the revenues collected, and disbursing on federal cheques; and in return for the privilege of holding the floating government balances, the bank had to pay the government $1,500,000 *per annum*. The government offices took the bank notes at par in payment of duties; and the bank was bound to redeem its notes in coin. Such was the bank. It saved the federal government the expenses of custody, of transportation; it kept huge sums of government money in circulation by way of loan, for the convenience of the people. But it is not to be overlooked that there were local banks and state banks in existence, willing to undertake all the work that the government required to be done.[1] Where, then, did Marshall find the power? He derived it from the "power to lay and collect taxes, to borrow money, to regulate commerce, to declare and conduct a war, and to raise and support armies and navies." For revenue has to be collected and expended through a vast territory; armies are to be supported on march; moneys raised in the North may have to be transported to the South, etc. The government which has a right and a duty to do an act must be allowed to select the means. The power to create a corporation (he says) is never used for its own sake; and it may fairly be taken as incidental to powers expressly given. Besides, there was the general power to make all "necessary and proper" laws for carrying into effect the express powers; and "necessary" does not mean absolutely necessary, but calculated to produce the end in view. "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit, are constitutional." I think this is a fair summary of the reasoning, extracted from a mass of noble rhetoric.

Then the question arose, could the state of Maryland tax the bank without violating the Constitution? The Maryland act required the notes of the bank to be on stamped paper furnished by the state; and the amount of the stamp was regulated by the amount of money specified on the note. This, Marshall held, was a tax on the operations of the bank, and so "a tax on the operation of an instrument employed by the government of the Union

[1] 2 Story, Constitution, 3d ed., 147.

to carry its powers into execution," and therefore void. For the laws made under the Constitution were supreme. There was, in the Constitution, one whole section devoted to restrictions on the powers of the states.[1] The states, hitherto independent and sovereign, were forbidden to make treaties, to coin money, to emit bills of credit, to make anything but gold and silver legal tender, to pass laws impairing contracts, to grant titles. There were, in the same section, express prohibitions even as to state taxation; for the states were forbidden (without the consent of Congress) to levy import or export duties, or duty of tonnage. Marshall admitted that the previously existing right of the state to tax was not abridged by the grant of a similar power to the Union. The powers not prohibited by the Constitution to the states were reserved to them;[2] and the express prohibitions might well be taken by some minds as negativing any implied prohibition — *expressio unius exclusio alterius*. But this was not Marshall's view. For the states, if they had power to tax at all, might tax the bank out of existence. If it were urged that the state legislatures, responsible to the electors, had to be trusted, the answer was that this argument, however applicable to state agencies and state electors, did not apply to federal agencies created by the people of all the states. If it were urged — as, indeed, it was put by Mr. Justice a'Beckett in Wollaston's case,[3] in which the point as to income-tax first came before the Supreme Court of Victoria — that it would be time enough for the court to interfere when any real obstruction to federal power or diminished efficiency in the federal agency has been proved, the answer of Marshall was clear and sufficient — that the courts must not be "driven to the perplexing enquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to an abuse of the power." If the state can tax at all, there is no point at which the tax can be said to become void. "They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house," etc. Marshall discovered the dividing line at the point where sovereignty and the sovereign power of taxation end. "The sovereignty of a state extends to everything which exists by its own authority or is introduced by its permission"; and federal instrumentalities do not come within this class.

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[1] Art. I. § 10. [2] Art. X. [3] 28 Vict. L. Rep. 395.

It seems clear that Marshall was influenced by the fact, which was obvious, that at a time when political feeling ran high in favor of and against the new national bank, the Maryland act was directly aimed at the bank, to injure it. But he did not base his judgment on such unsafe ground for a court as the possible motive of a legislature. He rested on the broad principle that the sovereign power of state taxation ends where the sovereign power of the federal legislation begins. Therefore it was as a mere corollary that the decision came in 1842 that a state could not levy income-tax upon a federal officer.[1] One Dobbins was captain of a revenue cutter in the federal service, and resided in Erie County, Pennsylvania. In pursuance of an act of Pennsylvania, he was assessed for his office, as such, for county rates. Under the act the assessors had to rate offices, posts of profit, professions, etc., having a due regard to the profits arising therefrom. This act was not aimed at federal officers: it applied to all. It was admitted by counsel for the state that the vessel, its appliances, its guns, could not be taxed — say by a tax on personal property. Then why tax the officer, who is equally a means for executing the national powers? Such taxation would compel Congress to graduate salaries according to the taxes in each state. It would destroy all uniformity of compensation. It would give the states a revenue out of the revenue of the United States. It would be an interference with the means devised by Congress to carry into effect its powers. It would, finally, conflict with the law of the United States, which secures the salary to the officer in its entirety.

The principle laid down in McCulloch *v.* Maryland has long been accepted as indisputable law throughout the United States. As Mr. Justice Story said in his Commentaries,[2] "If it is not now settled, it never can be." It has been applied *e converso* so as to exempt state officers from federal taxation of incomes.[3] It has been applied to United States government stock, but not to a federal officer's own house or possessions. It has been recognized by Congress in its legislation; for Congress, in creating national banks in 1864, provided specially that shares in such a bank might be included in the valuation of personal property for the purpose of state taxation, if the burden were not made greater than on

[1] Dobbins *v.* Erie County, 16 Pet. (U. S.) 370.

[2] 1858, 3d ed., p. 161.

[3] Collector *v.* Day, 11 Wall. (U. S.) 113, 124.

other similar property.[1] The Attorney General for Tasmania, in his argument for his state in d'Emden *v.* Pedder, did not suggest that the case of McCulloch *v.* Maryland was wrongly decided as matter of law in the United States;[2] nor did counsel for the commissioner of taxes in Victoria.[3] They attempted to distinguish the Constitution of Australia from the Constitution of the United States — they did not attempt to dispute Marshall's reasoning. The High Court was not asked to reconsider this.

Yet — was Marshall right, as a lawyer, in McCulloch *v.* Maryland?

Of course, it has been said that his decision saved the young federation, that it made the constitution workable. But the question is, was he interpreting the law or making it? *Judicis est jus dicere, non dare.* If it be urged that the laying down of this principle is a grand piece of constructive statesmanship, I have nothing to say. But then let us clearly understand that, according to such light of statesmanship as they may happen to possess, the judges are to supply gaps in legislation, to amend constitutions. Marshall, however, would have been the last to admit that a different principle was to be applied in the interpretation of a constitution and in the interpretation of other documents; or that, in his doctrine of implied powers and implied prohibitions, he passed beyond the legitimate bounds of fair construction. "The doctrine of implied powers," says Hare, "contains nothing exceptional or peculiar, or that is not applied in the interpretation of other instruments."[4] From the point of view of the lawyer, it is all a question of agency — what was the federal Congress authorized to do? What was the state forbidden to do? Certain definite and specified powers were conferred on Congress; and, amongst others, "power to lay and collect taxes, to borrow money, to regulate commerce, to declare and conduct a war, and to raise and support armies and navies." The residue of the powers was left — as before — with the states, which admittedly could create corporations for purposes of private profit. Yet Marshall deduced from the specified powers which I have mentioned an implied power to create a corporation for purposes of banking, for the private profit of the shareholders, but which could be made use of by the federal power. If this deduction is right, — that Congress can incorporate companies for private profit, — it is hard to see why it

[1] 13 U. S. Stats. at L. c. 106, s. 41.
[2] 1 Com. L. Rep. 103, 111.
[3] 1 Com. L. Rep. 585.
[4] Const. Law 117.

cannot enact federal marriage laws, in the interests of the order and efficiency of the federal service. Again, as I have already stated, the restrictions on the action and legislation of the states were collected in the Constitution in one section. These included restrictions on the taxing power of the states. Yet Marshall discovered another implied restriction under which states were prohibited from taxing federal agencies. His reason was that if the states had power to tax such agencies they *might* exercise it to such an extent as to cripple, if not wholly defeat, the operations of the national authority.[1] I ask, is this a sufficient ground for saying that the power is by the Constitution absolutely prohibited? Mr. Justice Story thought not. At least, in the case of Martin *v.* Hunter's Lessee,[2] decided in 1816, before McCulloch *v.* Maryland, he said: "It is always a doubtful course, to argue against the use or existence of a power from the possibility of its abuse. It is still more difficult, by such an argument, to engraft upon a general power a restriction which is not to be found in the terms in which it is given."

I venture to think that the introduction of powers by implication, of prohibitions by implication, cannot legitimately be carried so far, — at least, under modern British law. Judges, in interpreting and applying the law, have no right to assume the function of legislators. The justification for judges introducing words which have not been expressed must rest on logical necessity, not on political expediency. The implication must be necessary, not conjectural or argumentative. In the analogous case of easements of necessity, the grant is not implied if the grantee has any other means of access to his land, however inconvenient, than by passing over the grantor's soil. Since 1819 the limits of implication have been more clearly defined than before. For instance, there was the case of Doyle *v.* Falconer,[3] before the judicial committee of the Privy Council in 1866. A member of the Assembly of Dominica was taken into custody and committed to gaol for a contempt committed in the face of the Assembly. He brought an action for trespass and for false imprisonment. The Assembly had been duly constituted, by royal prerogative, but had been given no express power to commit. It was held that the defendants were liable for the false imprisonment, but not for putting the plaintiff out of the House. "The right to remove for

[1] See Cooley, Const. Lim., 7th ed., 680.

[2] 1 Wheat. (U. S.) 344, 345.

[3] L. R. 1 P. C. 328.

self-security is one thing; the right to inflict punishment is another." The former power is necessary to the existence of such a body; the latter is not — although very desirable. "Their Lordships, sitting as a Court of Justice, have to consider not what privileges the House of Assembly of Dominica ought to have, but what by law it has." Some seem to forget the force of "*esse*" in the maxim *Quando lex aliquid concedit, concedere videtur et illud sine quo res ipsa esse non potest.* This is the word — *esse* — found in Coke[1] and in Broom's Legal Maxims.[2] The test is, is the power necessary to the *existence* of such a body? This case was followed in Barton *v.* Taylor;[3] where, on similar grounds, the Speaker of the New South Wales Assembly — who happens to be a party to the income-tax decision as one of the Justices of the High Court — was held to have no implied authority to exclude an obstructing member beyond the duration of the sitting. The judicial committee refused to follow United States cases, such as Anderson *v.* Dunn,[4] where it was held that the House of Representatives had, by necessary implication, a general power to commit outsiders for contempt, although the Constitution expressly conferred only a power to punish for contempts committed by its own members. Probably, if the United States Constitution were not so difficult — I might say, impossible — to amend, the Supreme Court of the United States would not have allowed themselves to carry its implications so far. Here, as in so many other constitutional difficulties of the United States, we are brought face to face with its radical blemish — its rigidity.

"But," it may be asked, "was the national power to be treated as helpless in the face of such a direct attack as that made by Maryland?" Even if the answer were "Yes — unless the Constitution were amended," what then? The judges would have been doing their duty, leaving it to the people — under the constitution — to do theirs. But was the national power helpless? Could not Congress, which had power to create national agencies, protect them by express legislation? Congress could isolate national property: could it not isolate national servants? Could it not pass an act defining the relations of its servants to the state laws of taxation, forbidding taxation absolutely, or forbidding some particular tax, or forbidding it except under certain conditions? Congress has passed legislation taking away the exemption within

[1] 11 Rep. 52.
[2] 4th ed. 471.
[3] 11 App. Cas. 197.
[4] 6 Wheat. (U. S.) 204.

certain limits (in the Act of 1864 as to national banks). If that legislation is valid, why not an act creating such an exemption as seems to be necessary? I cannot find that any such suggestion was made in the argument before Marshall. Marshall entrenched himself on very strong ground when he spoke of the power of taxing being unlimited, and of the unfitness of the judicial department for the inquiry, "What degree of taxation is the legitimate use, and what degree may amount to the abuse of the power?" But though an unfit subject for the judiciary, it is not an unfit subject for Congress. "A power to create implies a power to preserve." These are Marshall's own words; and if Congress has to see to the execution of the national powers, if its legislation is to be supreme where it conflicts with state legislation, it may fairly be urged that an act protecting its servants from certain state taxation would be valid. The position is analogous to that under the trade and commerce clause. Any measure of state legislation, however legitimate in itself, yields to positive regulation of interstate or foreign commerce by act of Congress, if inconsistent with it.

At first blush, there is a great deal of force in the view put by the High Court in d'Emden *v.* Pedder, and in the income-tax cases, — that the interpretation of the United States Constitution having been long settled by judicial decision, it is a reasonable inference that it was intended by the framers of the Australian Constitution, when adopting similar language, that like provisions should receive like interpretation. But, on the one hand, it is doubtful whether this consideration should have so much weight where the words adopted have been taken from a foreign constitution, of which the framers of the Australian Constitution had no experience in the details of its working, and where the people who accepted and the Imperial Parliament which enacted the measure had practically no option but to accept it or reject it as a whole. And, on the other hand, the words are not the same in the two constitutions. However closely, in certain respects, the general framework of the Australian Constitution follows that of the United States, the sections 106–109 of the Australian Constitution are not the same in language as the Tenth Amendment of the United States Constitution; and the inference that the same form of words carries the same construction or the same consequences does not fairly arise.[1]

[1] The Australian sections are as follows:—

106. The Constitution of each State of the Commonwealth shall subject to this

It may be said that the correctness of the decision has now become a question of merely academic interest, the judgment of the High Court being final. The High Court has, with dignity and emphasis, refused to certify in favor of an appeal from itself to the Privy Council. The High Court has been given, by the Constitution, a peculiar status as guardian of the Constitution; and no "special reason" was put before the court which would justify it in shunting its great responsibility. The assertion of the position of the court in relation to the Constitution is far more important than the question of the propriety of the particular decision. So far as one can foresee, the decision will probably be treated as binding and conclusive, for many years to come. Then what is to be done? I agree with those who think that federal servants should pay the same taxes as their neighbors to the state in which they live. The argument that by compelling them to do so you destroy the uniformity of conditions for similar work in different states, which is the aim of the public service system, may be greatly exaggerated. A postmaster in Queensland, in the same class as a postmaster in South Australia, may get the same salary; and yet the climate may be different, the building may be better in one place than another. One may have his friends near him, the other may not. In Western Australia there is no income-tax; in Victoria there is; and yet the comparative cheapness of food and clothing and the other advantages in Victoria may be some compensation for the tax. What is to be done? In the United States a law was passed which purported to enable the states to tax the stock of national banks on the same scale as other personal property; and I have not found

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Constitution continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

107. Every power of the Parliament of a Colony which has become or becomes a State shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth or as at the admission or establishment of the State as the case may be.

108. Every law in force in a Colony which has become or becomes a State and relating to any matter within the powers of the Parliament of the Commonwealth shall subject to this Constitution continue in force in the State, and until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State.

109. When a law of a State is inconsistent with a law of the Commonwealth the latter shall prevail and the former shall to the extent of the inconsistency be invalid.

that the validity of the law has ever been contested. Yet it is hard to answer the argument of Senator Howard, in the debates which led up to that act, — that as, according to McCulloch *v.* Maryland, the Constitution forbade the taxation of such stock, Congress could not take away the prohibition. "It is certainly a very singular notion about states rights that the Congress of the United States can give to states rights of legislation which they did not previously possess."[1] Perhaps the best course — if we try to escape the effects of the decision — is for the federal Parliament to authorize a deduction from the salary of each federal officer of the amount which he would have had to pay as income-tax to his state and to pay the amount of the deductions to the state in which the officer lives. But even this suggestion is not without grave difficulties, practical as well as constitutional.

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MELBOURNE, VICTORIA.

[1] See Congressional Globe, 1864, p. 1958.